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Understanding Abu Ghraib: Accountability, the United States, and the Continuation of Torture

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1. Understanding Abu Ghraib

The history of torture in the United States is not a bright spot, but very much a stain on the nation's reputation when it comes to human rights. It is a stain that often goes ignored, under-researched, and looked past in comparison to other histories deemed more noteworthy. We know torture when we see it and we know that it is bad; yet people still find ways to rationalize its importance through limed "exceptional" cases that rely on unchallenged structures of governance. In public debates about "enhanced interrogation," techniques are justified as effective and necessary which reinforce myths and accepted truths about the U.S. government being morally superior in its leadership role in international affairs. The importance of telling this history becomes clear when brought to the surface, as the history of torture is contested. However, I did not realize how contested until I found myself facing contested histories surrounding the word torture in an arena bigger than I ever thought I would experience as an undergraduate student.

On October 8th, 2019, I posed a question to former Secretary of State and National Security Adviser Dr. Condoleezza Rice during a special guest lecture question and answer session at DePauw University. In a small group of thirty students, I asked her one of the last questions of the evening pertaining to the history of torture: "Since your formal exit from United States politics over 15 years ago and your return to academia, have you modified your stance or opinion about torture, specifically during the Iraq War, and the use of torture in future conflict?" Her immediate response was poised, straightforward, and assertive: "Excuse me, do you mean enhanced interrogation techniques?"

Dr. Rice's blunt reply coupled with the tense silence of the room made for an awkward pause in which I was unsure whether to respond or not. It was clear that the question was

rhetorical, but I felt compelled to respond. Instead, she abruptly continued, sensing the heightened mood, and briefly spoke about her persistent stance over the past quarter of a century on torture. That no one could have foreseen the future of U.S. security after 9/11, that enhanced interrogation techniques as a policy was completely legal, and that the United States does not and never has tortured. She ended by warning the room, specifically me, that language is very important in politics and one should never carelessly throw around a word like torture. Needless to say, I had a lot to debate.

At the end of her evening lecture, I was left with lingering thoughts about her comments earlier in the afternoon. Her response was unsurprising. It was consistent with her standpoint as National Security Adviser for the Bush administration but inconsistent with history. I had done some initial research on torture before Dr. Rice's visit. One can trace United States' use of torture and its problem with structures of accountability to long before the attacks on September 11th and the War on Terror. The U.S. government unleashed a counterinsurgency policy in Latin America during the Cold War that legitimized and legalized torture, amid other atrocities, while the U.S. publicly proclaimed itself to be a supporter of human rights and morally superior to the Soviet Union. However, few Americans know the history of torture, counterinsurgency policy, and how the United States government has consistently evaded being held accountable at the domestic and international levels.

Images from the infamous Abu Ghraib prison introduced the world to the United States' use of torture during the 2003 invasion and occupation of Iraq. Abu Ghraib prison was a United States Army detention center for captured Iraqis from where graphic photos depicting American military guards abusing detainees emerged in 2004. When the images were broadcasted around the world, former President Bush stated, "Under the dictator [Saddam Hussein], prisons like Abu

Ghraib were symbols of death and torture. The same prison became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values."[1] Bush's statement revealed a particular logic that continues to justify abuse today – that accountability means prosecuting the so-called "bad apples" who conduct torture in order to make the point that they are an aberration, not a product of a system-wide policy of sanctioned abuse.

Political scientists, journalists, and historians discussed and debated Abu Ghraib immediately following the scandal, typically labeling Abu Ghraib as an unfortunate byproduct of the War on Terror due to the post-9/11 context of fear needing immediate action. Mark Danner's account of Abu Ghraib written five months after the scandal broke, *Torture and Truth,* situated Abu Ghraib solely in the broader context of the Iraq War and alongside other scandals that erupted during the Iraq War and the War on Terror. Similarly, journalist Seymour Hersh (2004) established the connections between early missteps in the hunt for Al Qaeda and disasters on the ground in Iraq. Both Danner and Hersh's accounts raise the question whether fighting "a new kind of war" on terror justifies the use of torture.[2]

Much of the prevailing political discourse denies that the U.S. tortures prisoners while simultaneously justifying the use of such techniques for gaining information in order to foil terrorist plots. Given the obvious threat to human rights, Stanley Cohen (2006) favors a second history of torture that "chronicles the pattern of rationalizing tough interrogation techniques contained in a new paradigm for torture."[3] A second history of torture prompts us to critically examine the influence of discourse. Such discourse has a desensitizing effect, leading to the acceptance of harsh tactics as a "lesser evil" against bigger risks to national security (Ignatieff 2004).

Embarking on an analysis of torture, we explore the process in which unimaginable acts of brutality become "necessary" forms of policy. The current scholarship fails to ground this behavior within a longer history of counterinsurgency policy that reveals Abu Ghraib as a case study of continued and systematic torture while adhering to a narrative of exceptionalism that undercuts accountability processes at the national and international level. Abu Ghraib shocked people when the graphic images first broke in the spring of 2004. The true shock, according to former private contractor at Abu Ghraib Eric Fair, should be "that the American people were so shocked…or that they were so ignorant about what was going on."[4] From an informed historical perspective, what transpired at Abu Ghraib is not surprising since it was not an isolated incident of torture as declared by the Bush administration. Rather the events at Abu Ghraib fall into the troubled history of U.S.'s use of torture during counterinsurgencies and a lack of accountability for such violations of human rights at the national and international level.

Abu Ghraib represents a key moment in the history of torture which begs the question: Are the events of Abu Ghraib a rupture in the narrative of U.S. actions in the world as they pertain to the question of torture? The question gets to the heart of whether the problem of torture and accountability is new, or if torture and an absence of liability are deeply embedded within the history of counterinsurgencies and U.S. occupations. Abu Ghraib was certainly a byproduct of the 2001 War on Terror but the extent to which it was a colonial occupation blanketed in the language of counterinsurgency is significant. While the United States was looking for terrorists and collecting intelligence, they were also busy rooting out the Ba'ath Party and those loyal to Saddam Hussein while attempting to contain and defeat the resulting insurrection. By situating the atrocities of Abu Ghraib in the historical and political context of the continuation of U.S. counterinsurgency policy and notions of U.S. exceptionalism, the need

for further accountability can be addressed and prioritized going forward. Through understanding Abu Ghraib, we can avert our attention to the structural issues present within the United States government that both perpetuate the use of torture and prevent accountability at the national and international level.

2. The Road to Iraq

In order to understand the torture at Abu Ghraib as a case study, it is critical to unpack the origins of the Iraq War in connection to counterinsurgency strategy and interrogation at Abu Ghraib. The roots of the Iraq invasion and occupation partly lie in the belief that Iraq needed to be "liberated" through the overthrow of dictator Saddam Hussein and his regime – a discourse reminiscent of Cold War counterinsurgency strategy.[5] The Iraq War was also underscored by the attacks of September 11th and the War on Terror despite little evidence of any connection between Saddam and 9/11.[6] Though the Cold War ended decisively more than a decade before 9/11, the United States never reformulated its guiding ideas about how to manage security threats. As a result, confronted with a new enemy after 9/11, the Bush administration fell back into Cold War habits and created a state of exception that fed straight into the torture at Abu Ghraib.[7]

A history of counterinsurgency is evident in the lead up to the Iraq War through policy that encouraged the use of the military force for political gain. Counterinsurgency doctrine fixates on regime change through military force. One crucial piece of legislation that targeted regime change in Iraq before 9/11 was the Iraq Liberation Act of 1998.[8] The Iraq Liberation Act stated, "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq."[9] The act rationalized regime change and democracy through military force, resembling early counterinsurgency policy. The Iraq

Liberation Act authorized the President to provide the Iraqi democratic opposition organizations with Department of Defense (DoD) defense articles, services, and military education and training. In previous decades, the United States implemented tactics in El Salvador to advise and train the host nation military to operate effectively.[10] These early counterinsurgency strategies authorized military training that permitted force and terror. The authorization of military services through the Iraq Liberation Act highlights similar doctrine of past insurgencies concerning military force.

These early tactics and laws link the torture at Abu Ghraib to similar renderings of older U.S. counterinsurgency policy through language of legitimized terror in the form of military action even before 9/11. The United States authorized military education and training through counterinsurgency doctrine in both Latin America and Iraq. In both locations, accounts of torture can be traced back to these military strategies. Thus legislation prior to 9/11 suggests that the torture at Abu Ghraib was not just a rupture in the narrative but rather continued and patterned behavior on the part of the United States.

On March 19, 200,3 the United States invaded Iraq on the belief that dictator Saddam Hussein possessed weapons of mass destruction that could be used to attack the United States or their allies. It proceeded over the strong objections of most of the world community as the United Nations (UN) did not authorize force in Iraq. The United States essentially declared a state of exception from the normal rules for the declaration of war. The Security Council clearly stated that the use of force would require another "all necessary means" resolution.[11] Instead, President Bush and British Prime Minister Tony Blair authorized the invasion based upon ambiguous violations of previous UN Security Council resolutions.[12] The international community felt that either UN procedures should be followed or that the war should not be

launched. For the UN to not support the war and for the war to be launched anyway suggested to many that the U.S. had become lawless in international affairs.[13]

In the month-long major combat operations titled Operation Iraqi Freedom, the United States and allies produced a combined force of troops that faced little resistance during their campaign to Baghdad, the capital of Iraq. With this United States-led coalition, Saddam Hussein's government was overthrown, and Hussein went into hiding. On May 1, 2003 President George Bush declared an end to the invasion period and thus began the military occupation of Iraq by the United States.[14] The power vacuum following Saddam's demise led to a lengthy insurgency against coalition forces resulting in the implementation of counterinsurgency strategy.

The Iraq War laid the foundation for the atrocities and torture at Abu Ghraib as the basis for troops on the ground. Moreover, the invasion was not supported internationally and not formally declared and it is this bending and breaking of norms during the invasion and occupation that set the stage for administration policies that created similar conditions of ambiguity for troops at Abu Ghraib. An example is Order No. 1 issued by Jerry Bremer of the Coalition Provisional Authority (CPA) titled, "De-Baathification of Iraqi Society," providing that the top four levels of the Ba'ath Party to be barred from government jobs rather than on their actual conduct. The misguided policy eliminated the employment of tens of thousands of people and resulted in confusion, chaos, and incompetence alongside growing Iraqi resentment.[15] De-Baathification became a contributing factor in widespread social and political conflict. The policy also contributed directly to the growing population at Abu Ghraib, as many members of the Ba'ath Party were detained there.[16]

Regime change and poor policy created instability in Iraq that led Abu Ghraib to become a volatile and over-crowded environment where regard for procedures remained unpredictable. The Bush administration repeatedly invoked its ability to make exceptions to previous normal legality through increasing invocation of military rationales for its actions. The War on Terror translated to an "exceptional" circumstance, where rule bending was supported. The United States' contested invasion of Iraq based in part on desired regime change is intrinsically linked to the legitimization of terror and torture at Abu Ghraib. Thus, understanding the Iraq War alongside Abu Ghraib emphasizes the atmosphere in which the scandal at Abu Ghraib erupted and transpired allowing for a better analysis of these atrocities in terms of structural failures.

3. Coercion, Control, and Counterinsurgency Doctrine

Historically, a military doctrine of counterinsurgency has played a dominant role in the foreign policy of the United States. The Iraq War saw the continuation of counterinsurgency policy as an insurgency emerged after the defeat of conventional military forces in May 2003. Counterinsurgency is defined as military and political action taken against the activities of revolutionaries to contain insurgency and address its root cause.[17] Compared to conventional warfare, non-military means tend to often be the most effective elements, with military forces playing an enabling role.[18] Counterinsurgency has been seen to require "a blend of civilian and military capabilities and actions to which each U.S. agency…must contribute."[19] Both elements, civic action – or assisting an area through the capabilities and resources of a military – and brute military force contribute to implemented counterinsurgency doctrine. Broadly stated, modern counterinsurgency doctrine emphasizes the need to protect civilian populations, eliminate and defeat insurgent infrastructure, and help establish a legitimate host-nation government.[20]

The creation of counterinsurgency policy began at the end of World War II and the start of the Cold War as "operation doctrine" appeared in military journals. The rationale for the departure from the norms of conventional warfare was that in the new world of the Cold War, the enemy had no rules; therefore the U.S. had to have the moral fiber to respond in kind. The objective was to develop a capability for unconventional warfare to match that of the Soviet Union. Eventually the origins of "special" forces within the military transformed into establishing and assisting guerrilla forces and fighting them – or counterinsurgency doctrine.[21]

Beginning in the early 1960s, counterinsurgency policy was brought into the open by President John F. Kennedy.[22] Counterinsurgency policy legalized and legitimized state terrorism as a means to confront dissent and subversion. A reoriented foreign assistance infrastructure of military and civilian agencies provided an effective delivery system for counterinsurgency as a new weapon of the Cold War. Under the Kennedy administration, unconventional warfare and counter-guerrilla warfare were centralized and emphasized in foreign policy. Special Forces expansion "would be directed toward the development of a counter guerrilla capability for use in situations short of limited war, such as sub-belligerency and overt insurgency as well as in limited war situations."[23] Each of the armed services by the end of 1961 made an effort to develop its own official counterinsurgency resources.[24]

Counterinsurgency doctrine served as a statement of presidential policy, a broad view of the world linked to foreign policy aims and objectives, and military tactics. In an 18-month progress report by Joint Chiefs of Staff Chairman Lyman L. Lemnitzer in July 1962, Lemnitzer introduced the developments to the military doctrine. Lemnitzer wrote, "In January 1961, when the President announced his determination to add 'still another dimension' to our national arsenal…few understood that he contemplated anything more than a short-term tactic for fighting

guerrillas. Subsequently, it became plain that what the President had in mind was nothing less than a dynamic national strategy."[25] Counterinsurgency enabled military forces to become political actors through expanding the role that the military would play in conflict abroad. Embedded into political action was military force indicating that civic action was not the only procedure in the policy.

Counterinsurgency policy has two main components. First, counterinsurgency doctrine emphasizes order and economic growth which allows military institutions to be reinforced as political actors. The military played a role in diplomatic aspects where it encouraged civic action in targeted countries. Civic action projects included tasks of road building, creating periodic health clinics, and digging wells which connect to supporting military objectives. Civic action projects had both a psychological impact on the local communities and direct military utility.[26] In other words, civic action largely served a tactical purpose rather than a sole humanitarian goal. Larger initiatives intended to stop subversion quickly through reform or development while simultaneously the military aimed to provide security so that development could proceed.

Secondly, counterinsurgency policy legitimized terror and torture. The 1961 article in *Military Review*, "A Proposal for Political Warfare" represented the enthusiasm of political warfare which encapsulated no-holds-barred responses. It stated, "Political warfare, in short, is warfare – not public relations…It embraces diverse forms of coercion and violence including strikes and riots, economic sanctions, subsidies for guerrilla or proxy warfare and, when necessary, kidnapping or assassination of enemy elites."[27] Terror and torture were held to be the most powerful weapon of the guerrilla in early counterinsurgency policy. The military states carried out widespread torture and human rights abuses via ruthless counterinsurgency

strategies.[28] Therefore, counterinsurgent terror was characterized as drastic but necessary. Subversive terror could quickly be justified as tit for tat.

The translation of torture techniques from agencies to practitioners is found in the publication of a document titled the *KUBARK Counterintelligence Interrogation Manual*. In 1963, the CIA created the *KUBARK Counterintelligence Interrogation Manual*, which serves as the most well-known compilation of techniques considered to be borderline. *KUBARK* was intended as a manual for Cold War interrogations specifically in Asia in the 1960s then onto Latin America after 1975.[29] While the programs were intentionally covert, the rationale was not: torture would serve national security by fighting the threat of communism.

The manual explained the "principal coercive techniques of interrogation," which included arrest, detention, heightened suggestibility and hypnosis, pain, threats and fear, deprivation of sensory stimuli, debility, and narcosis and induced regression.[30] All of these techniques were defined as coercive due to the brute force of these measures. For example, sensory stimuli would involve use of bright lights, extended periods of darkness, loud music, and freezing temperatures, or extreme heat. In the *KUBARK* chapter "The Coercive Counterintelligence Interrogation of Resistant Sources," observations concluded that "all coercive techniques are designed to induce regression" and "relatively small degrees of homeostatic derangement, fatigue, pain, sleep, loss, or anxiety may impair these [normal] functions."[31]

The United States distributed so-called 'torture manuals' to forces in Central and South America instructing the U.S. military in interrogation techniques for explicit counterinsurgency purposes. Within the manuals the role of the questioner was highlighted, as the questioner had the ability to manipulate the subject's environment and the ability to induce a state of

helplessness and dependency. *KUBARK* stated, "Frequently the subject will experience a feeling of guilt. If the 'questioner' can intensify these guilt feelings, it will increase the subject's anxiety and his urge to cooperate as a means of escape."[32] The role of the questioner or the military guard was significant as they were the ones who "set the conditions" for interrogation. These techniques were designed to create "psychological fear, sexual humiliation and physical stress and cause sensory deprivation."[33] The nature of these techniques left the prisoner with both an expectancy of relief and hope but also helplessly dependent on the captors. During the wars in Latin America, the United States military utilized coercive techniques to collect intelligence to stop insurrection through force. [34]

By the turn of the century, the United States had a strong counterinsurgency policy primed for a nation like Iraq aimed at regime change and the spread of democracy. The non-military aspects of counterinsurgency provided much of the public face of the new doctrine, hence the paradoxical notion of a war of liberation.[35] However, the hard end of counterinsurgency, with dimensions of violence and systems of military organization such as Abu Ghraib, played the decisive roles on the ground when it came to counterinsurgency policy being executed. The argument for extralegal measures extended by counterinsurgency policy during the 1960s foreshadowed actions taken at Abu Ghraib that inflicted coercion, violence, and torture upon civilians in a sustained effort to seize and extend power to enforce regime change. The concept of counterterror justified American actions that broke down the behavioral standards of both constitutional law and the mainstream doctrine of the U.S. military. Thus, structural doctrine as a system-wide policy highlights how accountability needs to be further prioritized going forward.

Civic action policy in Iraq related to the "liberation" of Iraqis. After the emergence of the insurrection, the United States' objective remained to contain the insurgency with military force while projecting a global image of liberating the population. Just like in Latin America, where American military forces aimed to spread American influence and democracy, in Iraq the U.S. intended to bring about regime change in order to "liberate" Iraqis with hard power. Detention centers like Abu Ghraib were depicted as sites for medical care and assistance and shelter for civilians. Simultaneously, military force was used to guard the prison and undertake military initiatives, such as gathering intelligence.

The United States' counterinsurgency policy also included courting Iraqis to join the coalition in order to suppress the insurrection. The American military was made aware of cultural sensitivities and the Marine Corps gave troops a weeklong course on Iraqi customs and history as part of its civic action policy. Some of the examples included, "Do not shame or humiliate a man in public…The most important qualifier for all shame is for a third party to witness the act…Shame is given by placing hoods over a detainee's head. Avoid this practice."[36] However, these admonitions were turned on their heads by interrogators and used at Abu Ghraib for military purposes. Specifically, torture took place in front of foreigners, men and women, and the lasting third party, a digital camera. The camera served as a "shame multiplier" which gave unyielding power to the interrogator in an effort to enhance military goals of intelligence collection. In this way, shame was unending. The cultural training that was meant to serve the interests of coalition-building was turned into accentuating the impact of the torture at the hands of the U.S. military.

What transpired at Abu Ghraib is right out of a similar playbook of counterinsurgency strategies. Abu Ghraib exemplified what counterinsurgency has been about for the preceding

four decades. Violations of the law were part of the counterinsurgency strategy as the United States legitimized terror and torture. While repression in itself is not new, patterns of repression slowly evolved in close connection to U.S. security programs. The "anything goes" orientation played a major role in the shift from selective counterterror to the mass state terror of counterinsurgency states as seen in Iraq. It is the concept of counterterror itself that legitimized the disregard for the rule of law in ways that no other aspect of American military doctrine or foreign policy had done before.

4. The Violence of American Exceptionalism

Ever since the end of the World Wars and through the Cold War transition period, under both a Democrat and Republican President, the U.S. government has acted on the assumption that it is the destiny of the United States to spread the American version of democracy globally.[37] After 1945 it was natural for American exceptionalism to be viewed as a consequence of exceptional economic success and military power. The United States remained untouched by foreign invasion, at a time when America's rivals faced great difficulties, and thus the American nation and economy soared.[38] It is against this backdrop that the underlying assumption of American exceptionalism mobilized.

American exceptionalism is an ideology that promotes the idea that "America is exceptional among nations in its general superiority, and in particular in its political and moral superiority."[39] Many people around the world look up to what they see as distinctively American ideals of justice and democracy. American exceptionalism encompasses the tightly held belief that it is the duty of the United States to spread the benefits of its democratic system due to a (false) sense of moral and political superiority based on a colonial past. U.S. exceptionalism combines projecting a core belief system concerned with values of liberty, the political

sovereignty of the people, and the paramount rule of constitutional law with implied justification for broad based action.[40] There is a mythic aura to the claim of American exceptionalism. Phases of American history have been forced into a distorted and selective narrative of exceptional virtue. While this is not wholly untrue, important truths have been left out. An exceptionalist tradition has exaggerated the differentness and extreme egocentric character of American history.[41] Over time an exceptionalist philosophy has been more openly accepted as the basis of American foreign policy.

Beginning in the last decade, historians and political scientists recognized a new consequence of American exceptionalism. They observed repetitive instances where American practice or performance was exceptional by falling below international standards rather than exceeding them.[42] The actual conduct of the United States has not always been generally approved; for example, the two atomic bombs that were dropped on Japan in 1945 and the Vietnam War received a lack of approval internationally from some groups.[43] However, over much of the twentieth century, America was widely regarded and accepted as the one nation that could and should set the standard. Despite occasions of specific backsliding, the international consensus centered on the U.S. as being generally relied on to obey norms of behavior, to keep the peace, and to stand for the common decencies of international behavior.[44]

In recent years, the practice of American politics and the conduct of the American government led many to view the United States as exceptional in a negative sense, both in its methods and in its outcomes. The American political system puzzles many foreigners and many Americans too by the United States' rejection of assumptions that are generally shared elsewhere – with respect to international law and respect and support for international organizations.[45]

American intellectuals have begun to examine the negative consequences of U.S. exceptionalism and question if the theory that the U.S. is morally exceptional among nations still holds true.

There has always been a strand of exceptionalism in American patriotism that has occasionally translated into military aggression. Over time the U.S. drifted in the direction of a dangerous mood of international exceptionalism. Tested by the atrocities in 2001, the U.S. lashed out and human rights, which the U.S. promoted, no longer seemed so important in the bigger picture of American national security. As Hodgson remarks, "In some instances – in permitting humiliation, abuse, and torture of prisoners at Abu Ghraib and elsewhere in Iraq…the United States government seemed to have crossed a whole series of lines."[46] The United States was not merely falling short of its own high standards with respect to human rights and the rule of law but risked losing the almost universal international reputation for trustworthiness.

Not only have these policies been disastrous for the American reputation in the world but also for any realistic prospect of achieving their initiatives.[47] Explicitly, the Bush administration declared that they would invade Iraq in order to bring democracy to the Middle East. President Bush specifically struck the pure exceptionalist vantage point repeatedly in his speeches. Most famously in his 2004 Republican nomination speech, Bush stated, "we have a calling from beyond the stars to stand for freedom."[48] There can be little doubt that the prospects of spreading American ideals of democracy have weakened, especially in the Middle East, since the invasion of Iraq in 2003 and the torture conducted by American soldiers. The question remains what if the practice of American politics, so far from being a model for all to emulate, do not deserve to be exported?

Accountability is one way to define the United States as "exceptional" because the U.S. has rarely been held accountable for wide scale atrocities undertaken throughout history. In terms

of accountability, the United States continuously attempts to be exempt from any international rule of law. One branch of American exceptionalism is exemptionalism or supporting treaties as long as Americans are exempt from them.[49] The U.S. supports multilateral agreements, but only if they permit exemptions for U.S. citizens or U.S. practices. The American government adopted exemptionalism in many international transactions and exempted itself from the standards it desired to impose on others.[50]

Not only does the United States fail to uphold national and international standards of human rights, but they also do not hold themselves accountable when they fall short. When instances of misconduct have occurred, the United States has simply targeted "a few bad apples" rather than structures built upon the American exceptionalist creed. American global leadership in connection with exceptionalist discourse has produced false narratives of accountability, leading the public to believe that even in instances of failure, the United States is still the hegemon of values of truth, justice, and democracy – and that these ideals are solely American.

Simultaneously, the United States has not hesitated to encourage the selective application of the rule of law, aiming to use the law as a tool to hold *others* accountable. This is the second feature of American exceptionalism defined as double standards. The U.S. judges itself by standards different from those it uses to judge other countries. The United States held nations in Latin America accountable for insurrections resulting from U.S. interference in the 1970s and 1980s while claiming impunity. The U.S. has been condemned for arming, training, and funding death squads in Latin America, while condemning the guerrillas as terrorists.[51] Additionally, the U.S. after 9/11 attempted to hold many nations in the Middle East accountable for support of terrorist groups. Both occurred while system-wide American policies domestically were not challenged. The reluctance to be held accountable internationally does not make the U.S. any

different from other Great Powers. The difference between the United States and other nations in particular is the adamant urgency to claim moral and political superiority even in times of incorrect judgment.

U.S. exceptionalism is not entirely exceptional as most other nations see themselves in a positive light. However, the post 9/11 context and specifically the invasion of Iraq and Abu Ghraib illuminated the reality "that much of the world sees America rather differently from the way Americans see themselves."[52] A lack of responsibility on a systemic structural level originates from American exceptionalism as a powerful ideology that informs foreign policy and behavior such as counterinsurgency doctrine. Individuals at Abu Ghraib committed torture amid notions of American superiority both politically in the context of war and morally along Western standards. The history of torture and an absence of accountability are rooted in American exceptionalism as a foundation for counterinsurgency policy and the legitimization of terror. American exceptionalism is the moral ground for military aggression, regime change, and a lack of accountability among high-level officials, all of which were present at Abu Ghraib.

5. The Migration of EIT: Interrogation at Abu Ghraib

During the occupation period and growing insurrection in Iraq, there came the supposed need to gain intelligence as part of military counterinsurgency policy. After the 9/11 terrorist attack on the United States, the Bush Administration declared the Global War on Terror that sought to end terrorist organizations around the world. There was concern over the urgency to avert another attack on United States soil in the aftermath of September 11th. The Bush administration also aimed to connect dictator Saddam Hussein and Al Qaeda to each other and directly to the onslaught. In a speech to the UN in February 2003, Secretary of State Colin Powell stated there was "a sinister nexus between Iraq and the Al Qaeda terrorist network."[53] Al

Qaeda projected an extent of uncertainty that made the United States government concerned about future attacks.[54] The U.S. government also targeted those loyal to Saddam and members of the Ba'ath Party as individuals that could have possible information.

The detention and interrogation program better known as enhanced interrogation techniques (EIT) was authorized by President Bush six days after the terrorist attacks on September 11th through a covert action Memorandum of Notification (MON).[55] The MON allowed for the CIA "to undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities."[56] Essentially the MON allowed for extended detention previously prohibited.[57] The MON did not originally create EIT and actually did not mention interrogation techniques.

The program was briefly reviewed and determined to be lawful through the Department of Justice (DOJ) by attorneys and judges. The program was then implemented by the Central Intelligence Agency (CIA) at black sites, the location where unacknowledged black operations were conducted and used by the government for the War on Terror to detain alleged unlawful enemy combatants. In addition to the CIA, the Department of Defense (DoD), and the United States military, specifically the Army, ran prisons and detention centers throughout the world to detain and interrogate suspected terrorists under similar rules during the wars in Afghanistan and Iraq.[58] The program was one facet of a global counter-terrorism and counterinsurgency effort led by the intelligence community to dismantle Al Qaeda, other terrorist groups, and regimes to prevent another terrorist attack on American soil.[59]

The transformation and execution of the specific 'enhanced interrogation techniques' resulted from two outside contractors. American psychologists James Elmer Mitchell and Bruce

Jessen, who had previously worked in the U.S. Air Force Survival, Evasion, Resistance, and Escape (SERE) school which was allied to with the CIA.[60] Both men, identified by the pseudonyms SWIGERT and DUNBAR in the Senate Committee on Intelligence report, had no experience with real-life interrogations.[61] The Senate Select Report noted, "Neither psychologist had any experience as an interrogator, nor did either have specialized knowledge of Al Qaeda, a background in counterterrorism, or any relevant cultural or linguistic expertise."[62] As architects of the coercive interrogation tactics, they had been trainers in the SERE program which subjected military members to mock interrogations. In other words, both men spent their entire careers training U.S. soldiers to endure Communist-style torture techniques.[63] The two psychologists convinced the Bush administration that if they could reverse engineer the SERE tactics, they could break down detainees, leading to unique intelligence.

The process of interrogation has been a central component of military and intelligence operations. It is not out of the norm to do military interrogation. The question is to what extent and at what point does it cross a line and tip into torture. Confronted with threats to national security, the Bush administration, the CIA, Justice Department, and the U.S. military responsible for promulgating and executing interrogation and counterinsurgency policy were confounded by law. During this time, there was a blend of institutional resistance to improper or inappropriate practices and a fear of legal repercussions.[64]

Interrogation at the national security level in definition is not designed to primarily be used in conventional prosecution like police interrogation. Rather, the CIA interrogation manual states that admissions of complicity are not ends by themselves, but preludes to the acquisition of more information.[65] The goal of interrogation practices defined by the U.S. Army in the Army Field Manual is to "obtain the maximum amount of usable information…in a lawful manner, in a

minimum amount of time."[66] Embedded into this understanding is an inherent tension due to time and legal constraints.

EIT was based on "learned helplessness" where the individuals might become passive and depressed in response to 'uncontrollable' events. The theory was that if an interrogator could induce such a state, the detainee might cooperate and provide intelligence. "Learned helplessness" is part of the same playbook of earlier counterinsurgency field manuals aimed at leaving the prisoner helplessly dependent on the captors. The Bush administration approved the CIA's use of certain 'enhanced interrogation techniques' that included attention grasp (grabbing the prisoner by the collar in a quick, jerky motion), walling (slamming the prisoner into a flexible false wall), facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding. Additionally, EIT included temperature extremes, shackling, sleep and sensory deprivation, loud noises, bright lights, nudity, isolation, shaking, exposure to dogs, and head and stomach slaps.[67] These exact techniques, such as stress positions, sleep deprivation, and isolation are derived directly from early counterinsurgency field manuals like *KUBARK.*[68]

The Department of Defense had a Special Interrogation Plan that was authorized for use at Abu Ghraib. The Special Interrogation Plan under EIT regulated eighteen to twenty hours of questioning per day and authorized the removal of clothing and exposure to dogs, cold, strobe lights, and loud music. Additionally, the Interrogation Rules of Engagement in Iraq or IROE, suggested that high-level officials made harsh interrogation techniques such as sensory deprivation, isolation, stress positions, sleep management, and the use of dogs available for use in Iraq.[69]

The Bush administration had significant interest in constructing these methods as 'enhanced interrogation techniques' rather than torture. Within counterinsurgency policy and discourse are extra-legal measures that have historically produced targeted assassinations, massacres, and torture in Latin America. Embedded into the euphemistic term and techniques of EIT is policy that toes the line of what tips into torture. Both Mitchell and Jessen feed into counterinsurgency discourse by creating and executing techniques that extended previous protocol while simultaneously legitimizing the use of terror as a means to confront subversion in "exceptional" circumstances.[70]

Abu Ghraib, located near the Iraq capital of Baghdad, functioned as a prison for the United States military to hold individuals accused of having ties to Al Qaeda, the Taliban, those loyal to Saddam, as well as those in resistance to the U.S. occupation. Abu Ghraib prison opened in the 1950s in Iraq and served as a maximum-security prison. Under Saddam Hussein, Abu Ghraib became known for torturing prisoners, weekly executions, and unimaginable living conditions.[71] Not only were the conditions vile, but the sheer number of prisoners held reached an estimate of fifty thousand people at one time, but no accurate count is possible. Following the collapse of the regime in April 2003, the huge prison was looted and deserted. The United States repaired and renovated Abu Ghraib into a U.S. military prison complex by the summer of the same year. After the 2004 scandal, the prison was handed over to the Iraqi federal government to be reopened in 2009 as Baghdad Central Prison. However, it was closed permanently in 2014 due to security concerns.[72]

Abu Ghraib was mostly a tent camp with a 'hard site' that was a brick and mortar facility. Two tiers of the facility, Tiers 1A and 1B, were reserved for women, children, the sick, and those held for interrogations while the majority of prisoners remained in the tent camp. It was within

the ‘hard site’ in Tiers 1A and 1B that most torture that was photographed took place.[73] Prisoners fell into three loosely defined categories within Abu Ghraib.[74] The biggest category was common criminals, mostly individuals picked up in random military sweeps and at highway checkpoints. The other categories were those who had committed “crimes against the coalition,” which targeted those involved in the insurrection and a small number of suspected “high value” leaders of the insurgency against the coalition forces.

American officers did not know the population in Iraq well enough when detaining individuals to obtain usable intelligence. Major General George Fay wrote in his report “it became a common practice for maneuver elements to round up large quantities of Iraqi personnel [i.e., civilians] in the general vicinity of a specified target as a cordon and capture technique.”[75] Through these measures, American soldiers arrested thousands of Iraqis, similar to previous U.S. procedures prescribed in Latin America under counterinsurgency policy that targeted the masses. Instead of selective targeting, the U.S. military had their sights on the majority of Iraqi civilians. There was no prior knowledge that the civilians detained through these techniques were linked to Saddam or terrorist organizations.

Major General Fay confirmed in his Army report the obvious randomness of the arrests. He wrote, “SCT Jose Garcia, assigned to the Abu Ghraib Detainee Assessment Board, estimated that 85 – 90 percent of the detainees were of no intelligence value…Large quantities of detainees with little or no intelligence value swelled Abu Ghraib’s population and led to a variety of overcrowding difficulties.”[76] A disadvantage to nighttime sweeps as a technique for combating insurgency is that the prisoners scooped up in this way soon flood the system. The flood of incoming detainees contrasted with the slow pace of released individuals leading to overcrowding. Massive amounts of prisoners ended up overwhelming the very prisons where

detainees were meant to be exploited for actionable intelligence. Therefore, Abu Ghraib struggled to produce valuable intelligence due to structural failures of U.S. detention centers.

Amidst fighting a guerilla war, the critical weapon is not military might such as helicopters or tanks but intelligence. An essential tool in obtaining intelligence is reliable political support among the population. After the collapse of state authority, the U.S. was not able to fill the power vacuum which led to Iraqi resentment. Therefore, "cordon and capture" raids on thousands of civilians was a self-defeating tactic. The "cordon and capture" operations were too blunt and not carefully targeted. It signaled that the United States not only lacked the political support in Iraq necessary to find and destroy the insurgents but that the insurgents had forced them to adopt tactics that backfired. The counterinsurgency strategies were essentially a strategy of desperation. The overcrowding, the technique of rounding up civilians, and the fact that armed forces were not seen as liberators all highlight poor policy formulation and execution at higher levels.

Not surprisingly, the interrogation operations at Abu Ghraib suffered from the impacts of a broken detention operations system. Not only did the operational systems at Abu Ghraib have structural flaws but so did the leadership in charge of policy enforcement. When opened under U.S. control in 2003, Janis Karpinski, an Army reserve Brigadier General was put in charge of all military prisons in Iraq, including Abu Ghraib. Brigadier General Karpinski had never run a prison system before. She was in charge of thirty-four hundred Army reservists and most like herself had no training in handling or guarding prisoners.[77] The selection of a person who has never run a prisoner camp highlights poor decision making at higher levels. In the words of one company captain in Iraq, "It's all about people. The M.P.s [military police] at Abu Ghraib were failed by their commanders – both low-ranking and high."[78]

Both detention operations and the chain of command resemble past counterinsurgency procedures which similarly led to abuses at the hands of the U.S. government rather than successful intelligence collection. System-wide policies had a role in the mismanagement of detention operations beginning from civilian arrests to the organization and interrogations at Abu Ghraib in the name of intelligence collection. Poor decision-making at higher levels such as the DoD reveal the systemic continuation of policies that legitimize terror and torture in "exceptional" circumstances.

6. "Setting the Conditions": Moral and Legal Justifications

Despite near-universal condemnation of torture in principle, as a fundamental violation of human rights, democratic justifications for the use of torture have persisted. The detention and interrogation program that created the euphemistic term 'enhanced interrogation techniques' while not made specifically for military prisons, did lead to further legal guidance cited at Abu Ghraib as well. In this chapter, I examine the general moral and legal justifications for EIT when creating the program. To define justification, I express that a justification claim seeks to show that the act was *not wrongful*, while an excuse tries to show that the actor is not morally culpable for his or her wrongful behavior.[79] This distinction will be essential when reviewing an absence of accountability further on.

The CIA and the Bush administration researched coercive interrogations and the legal definitions of torture after the 9/11 attacks in order to redesign the standards for intelligence collection. A draft of a legal argument circulated within the Bush administration in late November of 2001 that presented legal defenses for torture better known as the Torture Memos written by John Yoo, Deputy Assistant Attorney General. The memos articulated that the United States could argue that "torture was necessary to prevent imminent, significant, physical harm to

persons, where there is no other available means to prevent the harm," additionally adding that, "states may be very unwilling to call the U.S. to task for torture when it resulted in saving thousands of lives."[80] These two moral and legal defenses are known as self-defense and necessity defenses. I will discuss self-defense and necessity in greater detail but for now it is sufficient to recognize that both types defend against violations of the law.

Self-defense is defined as "the use of force on or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose or protecting himself against the use of unlawful force by such other person on the present occasion."[81] Self-defense is a reasonable legal justification, but it can be hard to see how it could have anything to do with torture as the torturer is not threatened and the detainee is not a threat. Self-defense and necessity are closely related, but Yoo offers self-defense as a stand-alone option.[82]

Yoo argued that self-defense could be an appropriate defense to violations of 18 U.S.C. SS 2340 – 2340A (United States Code [of laws]). He offered an offbeat argument that it was the nation rather than the torturer who was under attack; the torturer is defending the nation, of which he is a part.[83] While it appears to be a stretch, there is some relevant case law. Scholar Fritz Allhoff points out that Yoo cited a Supreme Court case from 1890. *In re Neagle*, David Neagle – a U.S. marshal – was exonerated for killing the assailant of Supreme Court Justice Stephen Field on the defense that Neagle was asserting the executive branch's constitutional authority to protect the U.S. government (because Field was an agent of the government). The case held that federal officers were immune from State prosecution when acting in the scope of their federal authority as they were protecting the U.S. government.[84] Yoo also cited other cases as well as the U.S. Constitution to endorse the argument that members of the government can act to protect the government and those actions can be justified as self-defense.

There are limitations to Yoo's justification.[85] First, it is vague in how a terrorist is attacking the nation. It appears that the individual is attacking various individuals. There is a disanalogy between the terrorism context and *Neagle* as the reasoning for *Neagle* was rendered precisely because Field was a Supreme Court Justice. This is different from an attack on normal noncombatants. Secondly, the main case that Yoo appeals to is from 1890. The evidence is sparse and dated. Finally, there is no reason to employ the self-defense argument if the necessity defense can provide appropriate justification. This is especially true if the necessity defense is less attenuated, which suggests possible hesitations to these legal and moral justifications on the part of Yoo and the Bush administration.

A memorandum entitled "Hostile Interrogations: Legal Considerations for CIA Officers," from late November 2001 outlined a list of interrogation techniques considered to be torture by a foreign government and a specific nongovernmental organization (both classified). The draft memorandum described various prohibitions on torture and the use of 'necessity' as a legal defense against charges of torture. The legal analysis stated that officials should give consideration to the circumstances and to international opinion on the United States' current campaign against terrorism.

The Bush administration hypothesized that states may be unwilling to call the U.S. to task for torture when it resulted in "*saving thousands of lives,"* – or the ticking time bomb scenario.[86] The argument that torture, or "enhanced interrogation," can be justified in a limited set of exceptional circumstances would be repeated by the CIA in representations to the Department of Justice and senior officials.[87] In the ticking time bomb case, a terrorist is tortured so that an imminent threat is forestalled, thus saving the lives of potential victims.[88] The debate generated by this hypothetical is two debates actually, one moral and one legal. In terms of the Bush

administration, officials resorted to the both schools of thought for legal purposes and for public support during the War on Terror.

Within these debates, it might seem like the ticking bomb example may be an easy case, since the terrorist does not evoke much sympathy especially post 9/11. "Why not torture someone as a means to the end of preventing the explosion of a ticking time bomb that would otherwise kill many?[89] However, how is that argument different in principle? How many innocents are we willing to mistakenly torture for the sake of the possibility that there might be a ticking time bomb? Who exactly were the dangerous terrorists at Abu Ghraib? It is important to remember with these questions that in the official policy memos, both moral and legal responses were generated to support and promote EIT. The necessity defense permitted Yoo to appeal to U.S. national identity cloaked in false moral reasoning for legal justifications of EIT.

Another primary example of these moral and legal justifications can be found in a memorandum to White House Counsel Alberto Gonzales in 2002. The Office of Legal Counsel (OLC) analyzed whether specific interrogation methods would violate 18 U.S.C. SS 2340 – 2340A.[90] The document provided similar rationale as above, citing that certain justification defenses could potentially eliminate criminal liability and support their moral agendas. The memorandum concluded, "even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justification that would eliminate any criminal liability…Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives."[91] The administration authorized EIT based upon the assumption of productivity and effectiveness of torture defined by hypothetical scenarios of saving lives.

Self-defense and necessity defenses both use counterinsurgency and terror discourse in order to legitimize and rationalize extralegal measures of torture. Interrogation procedures had a manual before 9/11 based on decades old counterinsurgency policy. After 9/11, these procedures were reexamined by the CIA. The CIA then made a series of presentations to officials in the Bush administration stating that the EIT program was "uniquely effective" and "necessary" to collect unavailable intelligence as justification for the techniques. There were more presentations on EIT after the invasion of Iraq in the spring of 2003 and these continued into early 2004, shortly before the news of the scandal at Abu Ghraib.[92]

Within these presentations, the CIA provided a specific set of examples of terrorist plots "disrupted" to support their argument and to showcase the necessity defense. Listed in the 2014 Senate Select Committee Report on the Detention and Interrogation Program, examples included the thwarting of the Karachi Plots, the Second Wave Plot, and the Heathrow Airport and Canary Wharf Plotting.[93] The CIA also provided a list of terrorists captured that they attributed to intelligence gained through EIT that resulted in "saved lives." These representations of effectiveness were used by the Department of Justice to assess whether the CIA's enhanced interrogation techniques were productive and effective and thereby declared legal, as legality was rooted in success rate. Policymakers at the White House used these presentations to determine if the interrogation program should be approved as a matter of policy. Finally, Congress relied on the CIA representations to assess the program, provide funding, and create related legislation.

The CIA gave presentations to the executive and legislative branches about the interrogation program that claimed other parties had consented to or endorsed EIT when they did not know the specifics of the program. The CIA informed a subset of the National Security

Council that the use of the CIA's enhanced interrogation techniques was approved by the Attorney General when in reality he had not given his endorsement.[94] The CIA additionally provided examples of 'attacks averted' as a direct result of the CIA interrogation program and warned policymakers that the, "termination of this program will result in loss of life, possibly extensive," when accurate data did not exist to prove these claims. [95] In terms of decision making, the CIA authored presentations on research and information that contradicted one another as a result of poor policy formulation and execution at higher levels.

When the CIA was asked by White House officials to review and produce further evidence for the effectiveness of the CIA's enhanced interrogation techniques in 2004, the CIA stated that is was "difficult, if not impossible" to conduct such a review.[96] However, they assured White House officials that the program works, the techniques are effective, and that EIT produces results.[97] The CIA defended the interrogation program and its use of enhanced interrogation techniques saying that EIT "is intended to serve this paramount interest [security of the nation] by producing substantial quantities of otherwise unavailable intelligence."[98] These particular CIA claims played an essential role in the Department of Justice's legal review of EIT as a counterinsurgency tactic. Documents from the DOJ state that the analysis of legality surrounding EIT was highly context-specific and fact-dependent. The Torture Memos also highlighted the importance of the CIA presentations especially that enhanced interrogation techniques produced "substantial quantities of otherwise unavailable actionable intelligence and were largely responsible for preventing a subsequent attack within the United States."[99] However, there is no significant research known to support these claims of effectiveness.

The CIA's Detention and Interrogation Program was officially reviewed three times while it was operational from 2002 to 2009. The official reviews only came after the images of

Abu Ghraib were released. The first review was in May 2004 suggesting that the administration had confidence that they were within the law and doing the right thing morally as it pertained to interrogation techniques. The timing of the reviews highlights that it was only after a scandal that the administration recognized a need to review policy. A substantial complete review was a strategy of defense rather than a proactive and preventive step.

The reviews consisted of interviews with CIA personnel involved in the program and documents prepared by CIA personnel that represented EIT as effective. There was no indication in CIA records that any of the previous reviews attempted to independently validate the intelligence claims related to the use of EIT that were presented by CIA personnel in interviews and in documents.[100] As such, no review could confirm whether specific intelligence was acquired from a CIA detainee during or after being subjected to EIT. It also did not confirm if the intelligence acquired was unknown to the U.S. government (otherwise unavailable) and therefore valuable.

While the detention and interrogation program and 'enhanced interrogation techniques' were created for use by the CIA, the abuses at Abu Ghraib by the U.S. military in part can be viewed as a migration. Tactics used in Iraq came from enhanced interrogation procedures at places like Guantanamo Bay established in 2002. The detention and interrogation program was not authorized by President Bush for use at Abu Ghraib prison, but in August 2003 Major General Geoffrey Miller was authorized by the U.S. government to assess the potential to rapidly exploit detainees for actionable intelligence at Abu Ghraib.[101] His appointment to Abu Ghraib is significant as Major General Miller had previously been in command of the detention centers at Guantanamo Bay beginning in November 2002. While stationed at Guantanamo Bay, he trained

soldiers in ‘enhanced interrogation techniques’ and was chosen to evaluate Abu Ghraib on interrogation operations based upon his position.

Major General Miller had served in the United States Army since 1972. In 2002, Major General Miller was given command of Joint Task Force Guantanamo where he carried out the “First Special Interrogation Plan,” authorized by Secretary of Defense Donald Rumsfeld to be used on prisoner Mohammed al Qahtani.[102] He also had a hand in designing the seventeen torture techniques used. In September 2003, Major General Miller submitted a report on Abu Ghraib about how to make interrogations ‘more productive’ that advised using prison guards to soften up prisoners for interrogations. Through these channels, it was determined that Abu Ghraib would prioritize and enable interrogation - something that Major General Miller observed Abu Ghraib was not doing well or fast enough in the fall of 2003 before the abuse began.

The goal of his assessment was to focus on three areas: intelligence integration of authority, synchronization to establish the prioritization and tasking of all interrogation assets, and fusion of all required resources and actions of internee operations.[103] His observations led to a list of recommendations, most importantly the role of military guards and the integration of the detention center. He suggested that prisons like Abu Ghraib be geared towards interrogations and the gathering of information that would be most useful for the war effort. Major General Miller wanted to transform Abu Ghraib into a center of intelligence for the Bush administration’s global war on terrorism.[104]

One distinction that is important is the emphasis he put on military guards during the interrogation process. Army reservists are not trained in methods of interrogation and not authorized to interrogate suspects. However, Major General Miller determined “it is essential that the guard force be actively engaged in setting the conditions for successful exploitation of

the internees."[105] Major General Miller suggested that military guards be more aggressive without being precise about the method to be employed. Major General Miller was vague in defining how disciplinary actions for detainees were to operate in order to "set the conditions," thus leaving room for personal interpretation. [106]

Cited in the Taguba Report, the first internal comprehensive investigation of the abuses at Abu Ghraib, Major General Miller's recommendation of "setting the condition" is pivotal as the photographed abuse committed against foreign detainees came from prison guards who were not authorized or trained for interrogations. Major General Miller's recommendation suggested that joint strategic interrogation operations were needed at Abu Ghraib which he envisioned as the integration of the detention environment and the interrogation settings. Guards would "set the conditions," throughout the prison, blurring the distinction between interrogation and detention. As a senior commander, Major General Miller's visit linked Iraq to central policy.

Major General Miller's report is very similar to previous field manuals used for counterinsurgency in Latin America that legitimized terror.[107] Under his leadership, Major General Miller supported and encouraged the use of coercive techniques to extract actionable intelligence. His recommendations resulted in rule bending at the hands of the military guards and revealed flaws in the chain of command. Despite moral and legal justifications authored by Yoo, the drastic measures of abuse at Abu Ghraib are hard to defend when there was very little logic behind the reasoning. These moral and legal justifications demonstrate a need to examine the chain of command rather than solely the individual soldiers at Abu Ghraib. Self-defense and necessity justified American actions that broke down the behavioral standards of both constitutional law and the mainstream doctrine of the U.S. military as structural elements of the U.S. government thus alluding accountability.

7. Violations of International Law: The Geneva Conventions

The Torture Memos outlined not only several moral and legal justifications, but also defenses under the definition of the Geneva Conventions. The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention or the Geneva Conventions) was the specific international treaty in question. The Four Geneva Conventions are an important set of international treaties that establish standards for humanitarian treatment in war. Specifically, the Third Geneva Convention defines the humanitarian protections relative to the treatment of prisoners of war (POW) and has a set definition of torture that nearly all countries of the world have agreed to.

Bush's legal counsel undertook a finding regarding the interrogation of foreign detainees after 9/11, particularly who was protected and under what legal conditions of the Geneva Conventions. In late 2001, the OLC determined that "specific methods of interrogation would be permissible so long as they generally comport with commonly accepted practices deemed lawful by U.S. courts."[108] Thus, the United States Intelligence community began to search for potential legal defenses for utilizing interrogation techniques and to determine interpretive leeway. These defenses concerning the definition of interrogation and torture called upon counterinsurgency doctrine to legitimize terror as a military tactic. Through a deep dive into the Geneva Conventions, I analyze how torture was transformed and defended through the interpretation of language and discourse on an international level. An analysis of the Geneva Conventions allows the redirection of debates to be on the holes in structures like international laws and treaties in order to better address and prioritize accountability going forward.

On February 7th, 2002 President George W. Bush signed a brief memorandum titled "Humane Treatment of Taliban and Al Qaeda Detainees." The memo is paradoxical, as it

authorized the formal abandonment of the United States' commitment to key provisions of the Geneva Conventions. President George W. Bush established that the Geneva Conventions would not apply to Al Qaeda and certain prisoner-of-war (POW) protections of the Third Geneva Convention would not apply to Al Qaeda or the Taliban all based on the advice of the Department of Justice and one man White House Counsel Alberto Gonzales.[109] The memo was sent to all key figures of the Bush administration such as Vice President Dick Cheney, Attorney General John Ashcroft, Secretary of Defense Donald Rumsfeld and CIA Director George Tenet. They all received the note and acted upon it. As reporter Andrew Cohen remarked on the ten-year anniversary of the memo, "This was the day, a milestone on the road to Abu Ghraib: that marked our descent into torture – the day many would still say, that we lost part of our soul."[110]

The United States is a party to all Four Geneva Conventions but has not ratified Protocols I or II of the Third Geneva Convention. Protocol I reaffirms international law for international conflicts and further clarifies new accommodations – some being directly related to torture. By not ratifying Protocol 1, the U.S. is not subject to the legal bindings of all humanitarian protections for prisoners of war. The Bush administration saw the Geneva Conventions as an anachronism and cited that the War on Terror was a "new kind of war" meriting a change in policy. While the U.S. insisted that conditions of detention would comply with the Geneva Convention standards, interrogation procedures would be determined by executive order of the President.[111]

The executive order gave the United States 'flexibility' in the War on Terror which blended into the occupation of Iraq. While those imprisoned in Abu Ghraib tended to be Ba'ath supporters and Saddam loyalists, there is no documentation of all criminal arrests. Judge Alberto Gonzales, as White House Counsel, determined that the Conventions did not apply entirely to

selective detainees. The decision came from his argument that "the war against terrorism is a new kind of war" thus ushering in a new paradigm which "renders obsolete Geneva's strict limitations…and renders quaint some of its provisions."[112] For example, all four of the Geneva Conventions would not apply to the war with Al Qaeda because they were "not a High Contracting Party to Geneva."[113] Judge Gonzales did not consider Al Qaeda a nation-state, a signatory to treaties, and the members of Al Qaeda were not qualified as legal combatants under Judge Gonzales' ruling.[114] The right to torture – for this was a search for a legal endorsement of torture – was predicated on failed statehood and the construction of international terrorism as a "new war."[115]

Judge Gonzales also advised that both Al Qaeda and members of the Taliban were unlawful combatants not meriting POW status. Since none of the four Geneva Conventions applied to the conflict with Al Qaeda, Al Qaeda detainees were determined to not be prisoners of war. The Geneva Conventions applied to the Taliban; however, Gonzales also advised that "based on the facts supplied by the Department of Defense and the recommendations of the Department of Justice, Taliban detainees were [are] to be considered unlawful combatants meaning that they did not qualify as prisoners of war."[116] Gonzales determined that the Taliban did not meet the necessary requirements of Article four of the Third Geneva Convention which are to belong to a hierarchical command structure, to bear a distinctive sign, to carry arms openly, and to behave in accordance with the laws and customs of war.[117]

At the end of the memorandum, President Bush declared that the Al Qaeda and Taliban detainees were nevertheless to be treated in a manner consistent with the principles of the Geneva Conventions. President Bush stated in regard to prisoners of war, that the United States would be "adhering to the spirit of the Geneva Conventions," and contended that the United

States would remain a strong supporter of the Geneva Conventions and treat detainees humanely even those "who are not legally entitled to such treatment."[118] However, an added clause to Bush's statement read "depending as long as such treatment was also consistent with military necessity."[119] The clause allowed interpretations of international law and the standards of accountability to hang in the balance of enforcement.

There were also debates internal to the White House and Office of Legal Counsel in the Torture Memos surrounding the President's authority as Commander-in-Chief. Jay Bybee, Assistant Attorney General, concluded that the President's authority to manage a military campaign overrode any statutory or treaty prohibitions against torture. Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.[120] The decisions by the Bush administration reinterpreted the Geneva Conventions to suit the administration's purposes under the guise of fair treatment regardless of status.

It is unsure exactly whether or not prisoners detained at Abu Ghraib had connections to the Taliban or Al Qaeda specifically, particularly those subjugated to torture as the United States did outsource torture.[121] There is limited documentation and research on those individuals tortured at Abu Ghraib. Therefore, the exact protections for each individual prisoner under the Geneva Conventions are unknown as no protections were stripped away for those accused of being loyal to Saddam or resisters to the occupation – many of the reasons for detainment at Abu Ghraib. Also, Abu Ghraib prison in Iraq, overall, was a place where the Geneva Conventions applied.

The key is that the policies and practices developed and approved for use on Al Qaeda and Taliban detainees who were not afforded the protection of the Geneva Conventions, now

applied to detainees who did fall under the Geneva Conventions' protections at Abu Ghraib – specifically through legal and moral justifications. As Cohen (21201) stated, "Our journey toward Abu Ghraib began in earnest with a single document – written and signed without the knowledge of the American people."[122] The migration of EIT to Abu Ghraib suggests that large structures remained unchallenged thus allowing patterned behavior to continue. The Bush administration continually attempted to connect 9/11 and Saddam, thus partially allowing for Geneva restrictions to be lifted even if the authorization to do so was not permitted. Additionally, U.S. exceptionalism can be read here, as the migration of EIT suggests that the Bush administration was not worried about facing accountability. The decisions were blatant in transplanting a Guantanamo Bay officer to Abu Ghraib who had free rein in digging up actionable intelligence.

Those captured in conflict whether members of Al Qaeda or the Taliban should have been treated as POWs until a competent tribunal individually determined their eligibility as stated in the Geneva Conventions. Taliban soldiers should have been granted POW status because they openly fought for the armed forces of a state party to the Conventions. Al Qaeda detainees might not have been given POW status, but the Geneva Conventions still provide explicit protections to all persons held in an international armed conflict. One protection includes the right to be free from coercive interrogation.[123]

An analysis of the Geneva Conventions suggests that U.S. exceptionalism influenced interpretations of international law when it came to responsibility. Bush's interpretation of the Geneva Conventions exemplifies how through an American superiority lens, exceptions were allowed and granted – Protocol 1 not applying to Al Qaeda or the Taliban. Rather than simply considering the aftermath of 9/11, U.S. exceptionalism as an ideology suggests that the Bush

administration-based decisions upon notions of moral and political superiority. By examining Abu Ghraib and international law through the lens of exceptionalism, new details emerge in the history of torture. While the Geneva Conventions were interpreted specifically for EIT at Guantanamo Bay, these international laws should have also been upheld at Abu Ghraib but were not. Thus, an analysis of the Geneva Conventions reveals how these structural mechanisms operated in a way that did not prioritize accountability.

8. Violations of International Law: The United Nations Convention Against Torture

Among the revelations is the infamous White House definition of torture, contradicting the standard interpretation established in the Convention Against Torture. The United Nations Convention Against Torture (UNCAT), is an international human rights treaty created by the United Nations in 1987 which mandates a global prohibition on torture. Some national legislation mirrors the language found in UNCAT definition, while nations like the U.S. have more narrowly focused definitions of torture.[124] Within the Torture Memos, two documents altered the definition of torture. In a memo by John Yoo, he outlined the legality of 'enhanced interrogation techniques' during the War on Terror and what would be the invasion of Iraq as it pertained to UNCAT as international law. A memorandum by Jay S. Bybee, Assistant Attorney General also altered the definition of torture in terms of pain and suffering. Both examine how far American military and intelligence personnel are permitted to go in interrogating prisoners.

The UNCAT defines what is meant by torture, bans the use of torture, and requires governments to actively prevent torture and investigate torture allegations. Torture violates domestic law Title 18 of the US Code Section 2340. The United States believed that enhanced interrogation methods complied with Section 2340 within the United States Code and therefore

would not violate the international obligations under the United Nations Convention Against Torture. While the UNCAT applies to the United States, it does so conditionally. The U.S. made reservations to the treaty and additionally announced interpretive understandings attached to the instrument of ratification.[125] Yoo noted that UNCAT does not prohibit state parties from adopting specific understandings of ratification thus allowing the U.S. to modify definitions.[126] The United States Code Section 2340A defined torture as,

"an act committed by a person acting under the color of law **specifically intended** to inflict **severe** physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control" (emphasis added).[127]

In comparison, the definition of the United Nations is,

"any act by which **severe** pain or suffering, whether physical or mental, is **intentionally inflicted** on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."(emphasis added)[128]

There are slight differences in the language of the two definitions. Both definitions require intention to be present in acts of torture, stating that the perpetrator must be conscientious of what he or she is doing. However, the key term of *specific* in the U.S. definition separates the two. In a court of law, proving intent is not easy, but feasible; however, *specific* intent, rather than *intentionally inflicted,* the clear and definitive knowledge that the perpetrator explicitly intended for the end result, is harder to prove. Therefore, the U.S. definition of torture lengthens the question of extent and the line where behavior tips into torture.

The language of the U.S.C. definition also relies on counterinsurgency discourse reflective of the United States' past. The narrow language for the U.S. definition of torture paired with Yoo's interpretation, clearly spells out the language of counterinsurgency policy through

the transformation of counterterror. Counterinsurgency policy extends legal measures and legitimizes torture and state terror. In the same Torture Memo addressed to Judge Gonzales from John Yoo, Yoo contended that the United States Code Section 2340A does not violate the meaning of the "object and purpose" test either. Similar to counterinsurgency policy, Yoo reasoned that the United States had not defeated the object or purpose of the Torture Convention by altering the definition.

Yoo understood the UNCAT definition to apply conditionally to the U.S. because of a particular understanding of the treaty that was put in when ratified and authorized by the Senate that complied with Section 2340 in 1994. He reasoned for an act to constitute torture, it must be **specifically inflicted** upon an individual, making clear that the intent requirement for torture had to be easily identified.[129] Yoo concluded that the United States was only bound by the text of UNCAT as modified by the Bush administration's understanding. Therefore, the United States' obligation under the Torture Convention was identical to the standard set by Section 2340 which allowed for a narrower definition. John Yoo argued, "Conduct that does not violate the latter does not violate the former."[130] So long as interrogation methods did not violate Section 2340, they also did not violate international obligations under the Torture Convention.

There are also discrepancies in the definition of torture concerning the word severe relating to the amount of pain and what kind is administered. Section 2340 specifically clarifies the meaning of severe mental pain or suffering as,

> "the prolonged mental harm caused by or resulting from – intentional or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality, the threat of imminent death, or the threat that another person with imminently be subjected to death, severe physical pain or suffering, or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality."[131]

The Bybee memo added surgical precision to the definition. For mental pain or suffering to qualify as torture, it had to result in significant psychological harm of significant duration lasting approximately "months or even years".[132] Bybee was able to add form and substance to the definition of mental pain through the interpretative understanding. Mental pain had to rise to a severity comparable to that required in the context of physical torture. The Bybee memo claimed that physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.[133] Defining the body's breaking point as reflecting "severe" pain is a subjective definition of severity. Bybee's rationale authorized interrogation techniques falling short of causing physical pain comparable to organ failure or long-term significant psychological harm. This custom-made definition of what constitutes tortures raises the threshold of pain to the point when a victim cannot talk because they are dead or near dead.[134] Torture is defined by its end point, instead of the process through which the infliction of pain leads to the body's breaking point.

Efforts by the White House to sidestep its obligations under the UNCAT, along with federal statutes prohibiting torture, worry the human rights community. However, to secure the cooperation of its agents, the Bush administration prepared legal justification. It had to eliminate the legal risks for abusers and assure military personnel that their actions would carry no penalty. Thus, torture is redefined in a way as to invite its use with impunity.

9. Violations of International Law: The International Criminal Court

Although the United States claims to be a long-time supporter of human rights, the United States was one of only a handful of nations to oppose the creation of the ICC in its current form. The Rome Statute for the International Criminal Court (ICC) established an

international court with jurisdiction over genocide, war crimes, and crimes against humanity in 1998 that took effect in 2002. The ICC is set up to try individuals for the world's worst atrocities but can only intervene when countries are "unable or unwilling" to prosecute mass murderers or perpetrators of other systematic abuses. Despite the moral intentions of the ICC, many nations, like the United States, remain non-signatories.

The foremost fear of the United States about the ICC stemmed from concern that the ICC would be used as a political weapon to unfairly target U.S. political and military leaders for actions related to national security. The ICC has been one of the most embattled multilateral institutional-building projects. In 1998, the U.S. negotiated about the International Criminal court over how the proposed ICC would function. From the outset, negotiations about the court's Statue were marked by controversies among participating states. However, the United States secured guarantees that its military, diplomats, and politicians would never come before the court. Faced with the reality that the ICC would come into existence, the Bush administration devised a new strategy where nations could sign bilateral agreements with the U.S. whereby, both signatories would pledge to not hand over individuals accused of atrocities. By mid-June of 2003, 37 countries had signed such agreements with the United States.[135]

The United States has tended to believe that the power of the nation is essential to advance American ideals throughout the world. There is substantial risk with the ICC that politically motivated charges will result in investigations by an ICC prosecutor against U.S. political and military leaders.[136] John Yoo touched on the possibility of an ICC investigation to prosecute interrogations at the end of the Torture Memos. He concluded that the actions taken in the interrogation process of Al Qaeda operatives would not fall into the jurisdiction of the International Criminal Court, although "it would be impossible to control the actions of a rogue

prosecutor or judge."[137] The ICC is not checked by any other international body. The prosecutor can initiate investigations without a referral from a state party to the Rome Statue. The freedom inherent in the Rome Statute means that the ICC prosecutor remains largely unaccountability.

There is a possibility that an ICC official might not agree with the Bush administration's interpretation of the Geneva Conventions and POW status. The U.S. objects to the possibility that an independent prosecutor could bring indictments against U.S. personnel. The United States preferred that cases be referred only by the Security Council, where the U.S. possesses the veto. It is definitely possible that a conscientious prosecutor and judicial panel might authorize proceedings over the objections of the United States. Yoo ended the Torture Memos by warning, "Our office can only provide the best reading of international law on the merits. We cannot predict the political actions of international institutions."[138]

There are two plausible situations in which the ICC could constitute torture as a crime under the Rome Statute. First, torture might fall under the ICC's jurisdiction as a crime against humanity if it is committed as part of widespread and systematic attack directed against a civilian population. John Yoo determined that interrogations were not a part of systematic attack on any person. He concluded that the War on Terror was an attack on terrorist organizations, not a civilian population – despite Iraq being an invasion and occupation of a sovereign nation by the U.S. that resulted in an Iraqi insurgency. Yoo also argued, "If anything, the interrogations are taking place to elicit information that could prevent attacks on the civilian population."[139]

Torture could also fall under the jurisdiction of the ICC's as a war crime. However, the Rome Statute makes prosecution of a person for torture by the ICC contingent upon the victim's protection by the Geneva Conventions. To constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva

Conventions."[140] Bush declared on February 7, 2002 that the Geneva Conventions did not apply to Al Qaeda or the Taliban. Therefore, interrogations of either group would not constitute a war crime, most specifically Al Qaeda operatives in Yoo's interpretation. While the Geneva Conventions applied to Iraq, the state of exception resulted in rule bending.

U.S. exceptionalism as a cultural phenomenon is especially evident in the United States approaches to internationally recognized human rights. The United States preaches universalism, but practices national particularity.[141] An effective international law would constrain the exercise of U.S. power. The last thing the U.S. wants is for international legal authorities to be peering over its collective shoulder regarding foreign policy. The U.S. was critical of the World Court (ICJ) in the case of *Nicaragua v. U.S. (1986)* which dealt with counterinsurgency and subsequently withdrew from the compulsory jurisdiction of the ICJ.[142] There was no countervailing power to compel the U.S. to implement judgement then and with structures like the ICC now, impunity continues. Dubriske and MacCuish (2005) remarked, "With regard to the idea of permanent international tribunal, it is clear now that the United States will not be able to 'have its cake and eat it too.'[143]

10. Accountability on the World Stage: Systemic Structural Failures

The past three chapters have analyzed three violations of international law on the part of the United States– the Geneva Conventions, the UNCAT, and the ICC – and how in addition to the context of 9/11, counterinsurgency doctrine and exceptionalism have exacerbated the lack of accountability in the case of torture at Abu Ghraib. The lack of support has led many in the world to believe that the U.S. will only participate within the international community if they are allowed to play under a modified set of rules. The United States' behavior raises a fundamental question about the place of the U.S. inside the network of international laws and conventions that

regulate a globalizing world. To what degree does the U.S. play by the rules it itself has helped to create and accepts constraints on its sovereignty through the international human rights regime?

The United States signs to international human rights and humanitarian law conventions and treaties and then exempts itself from their provisions. [144] The United States, by not ratifying parts of these treaties and laws, exempts itself from accountability when it comes to human rights. The U.S. purposely avoids ratification despite the majority of nation-states agreeing to these structures. Allowing a state to pick and choose how it adheres to such a central structure threatens to empty international conventions of their universal structure. These actions suggest that the U.S. relies on the ideology of moral and political superiority to evade facing responsibility. Even when the U.S. ratifies international conventions, it does so with provisions that cannot supersede U.S. domestic law as in the case of UNCAT. Therefore, American ratification renders U.S. participation in international human rights symbolic, as adopting measures does not actually improve protections.

The emergence of the United States as the world's only superpower in the early 21st century has increased the demand amongst believers of U.S. exceptionalism that the U.S. should be exempt from any international rule of law. Simultaneously, the United States has not hesitated to encourage the selective application of the rule of law, aiming to use the law as a tool to hold *others* accountable. The double standards inherent in this myth of American exceptionalism are patently obvious. The United States government continually behaves in ways that violate these laws and treaties, while judging the actions of other countries by standards established in these same treaties. The U.S. also judges its friends by standards different from their enemies. Overseas, the United States condemns abuses by hostile regimes – Saddam Hussein and Iraq for

example – while excusing abuses by allies such as Israel.[145] Hence, after Abu Ghraib, the U.S. faces accusations that its own policies toward torture have been guilty of promoting double standards across the globe.

U.S. and Western imperialism and exceptionalism is defined by the claim that expanding domains are critical to spreading the rule of law internationally. From this vantage point, the U.S. and the Bush administration showed open disdain for the rule of law. The Bush administration argued that in the 21st century there was a sharp opposition between the rule of law and democracy, two values typically seen as "cornerstones of Western civilization."[146] The U.S. claimed impunity for American actions in the name of proliferating democracy.

The cavalier attitude to the rule of law in the international arena is highlighted with the ease in which the U.S. has felt free to withdraw from treaties, most significantly from the Geneva Conventions but also bypassing UN resolutions. When Secretary of State Colin Powell was asked whether the U.S. was explicitly seeking Security Council approval to invade Iraq in 2003, Powell cited Kosovo as a precedent for acting without such authority. The Security Council never authorized force against Yugoslavia in the Kosovo War in 1998. Secretary Powell had no hesitation in noting that the Security Council "can decide whether or not action is required," but the U.S. "will reserve our option of acting" and "will not necessarily be bound by what the Council might decide at that point."[147] Simply put, Secretary Powell argued that the Security Council's decisions were not binding upon the United States government. Given such brazen defiance of international institutions, how effective can such structures be in holding states accountable for violations of human rights at the national and international level?

11. The Aftermath of Abu Ghraib: The Senate Armed Services Hearings

General Antonio Taguba first investigated the abuses at Abu Ghraib in the beginning of 2004. His internal report found systematic, intentional, and illegal torture of detainees by military police, military intelligence officials, and private contractors. The soldiers committed "punching, slapping, and kicking…arranging naked male detainees in a pile and jumping on them… placing a dog chain…around a naked detainee's neck and having a female soldier pose for picture."[148] General Taguba also determined, "This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force."[149] The evidence of abuse from Abu Ghraib implicated both individuals and policymakers. Yet, leaders evaded and deflected any blame directed at them.

In the aftermath of Abu Ghraib, the Senate Armed Services committee held seven public hearings on U.S. detention operations. Over the course of the hearings, military and civilian officials consistently articulated that no policy, directive, or order authorized the photographed torture at Abu Ghraib. However, a group of senators, mainly but not exclusively Democrats, argued that the torture resulted from policy decisions at higher structural levels.[150] In particular, there were two debates over military policy and accountability that aimed to explain the torture at Abu Ghraib – one debate over a controversial phrase and another about a controversial set of documents. Both explanations linked high-ranking officials in the military chain of command to the violence at the facility.

Under a microscope, the phrase "set the conditions" was dissected. The phrase referred to the previously mentioned recommendation from Major General Miller. General Taguba's findings were essential in assessing accountability. In his report, he determined that "personnel assigned to the 372nd Military Policy Company were directed to change facility procedures to

"set the conditions" for military intelligence interrogations…[this] is bolstered by pictures that suggest that the sadistic abuse was part of an organized and conscious process of intelligence-gathering." In other words, the actions did not appear to be aberrant conduct by individuals, but part of a conscious method of extracting information. In the committee's hearings, elected personnel argued that the recommendation was evidence of upper-level military or civilian officials contributing to the torture at Abu Ghraib.[151]

Senators in the committee argued that Major General Miller's recommendation – that military police "set the conditions" for interrogations – established an abusive detention and interrogation program. However, the causal link between recommendation and the abuse weakened over the course of the hearings. Instead, the sustained argument became that a misinterpretation of Miller's recommendation may have contributed to detainee abuse at Abu Ghraib; it was no longer direct. Military and government officials argued that the use of these "enhanced" techniques would not, in and of themselves, violate the Geneva Conventions or military regulations. Rather, the techniques would depend on how interrogators specifically interpreted and implemented them.[152] The explanation suggests that the recommendation had veered dramatically off its intended course and only resulted in torture because of low-level and local failures at Abu Ghraib rather than structural issues in operations.

The second debate surrounded the controversial documents that the military chain of command in Iraq provided military interrogators – the Interrogation Rules of Engagement in Iraq or IROE. The documents suggested that high-level officials made harsh interrogation techniques such as sensory deprivation, isolation, stress positions, sleep management, and the use of dogs available for use in Iraq.[153] Specifically, the IROE had one slide that listed the above techniques. The debate in the hearings focused on the techniques that Commanding General Ricardo

Sanchez had authorized for use in Iraq. The questions aimed to constitute the interpretive boundaries of the debate about the IROE in Iraq. Similar to the phrase "set the conditions," official responses to these questions were downplayed, if not outright denied. It was argued that the connection between the military chain of command and the documents was nonexistent. The high-ranking personnel denied responsibility for the IROE's creation and adoption in Iraq. Donald Rumsfeld denied that he had approved additional interrogation techniques for use in Iraq and attributed the IROE to Commanding General Sanchez.[154]

On May 19, 2003, Commanding General Sanchez testified that he had approved the Interrogation Rules of Engagement (on September 12, 2003) but that he had not seen the specific slide that had the harsh interrogation techniques on it. In other words, Commanding General Sanchez denied approving the document of techniques that were, at least in September of 2003 when the torture of detainees at Abu Ghraib was ongoing, the very interrogation tactics that he approved for use in Iraq.[155] This issue was not raised. Instead it was noted that the IROE established a route by which Commanding General Sanchez's influence could enter at Abu Ghraib; however, by requiring that interrogators seek Commanding General Sanchez's authorization for the use of the interrogation practice, the IROE left that influence dormant. Only further requests for approval could mobilize it.

The capacity to link high-ranking officials to the violence at Abu Ghraib weakened over the course of the hearings. Additionally, the entire set of hearings did not place what transpired at Abu Ghraib within the larger counterinsurgency narrative. The events were not pushed into being viewed in this manner by journalists either.[156] All of these arguments are to say that individuals in positions of power minimized the chain of command's responsibility for the torture at Abu Ghraib thus allowing blame to fall on local and low-level operations solely. The Senate Armed

Services committee did not question national or international structures that permit torture but instead fixated on a "few bad apples."

12. A "Few Bad Apples": Accountability and Low-Ranking Officials

Even when there is evidence of complicity at the highest levels of government, blame finds its lowest plausible level. In the aftermath of Abu Ghraib, eleven low-ranking soldiers were court-martialed and sentenced for torture at Abu Ghraib. The narrative of a "few bad apples" took center stage at many of the trials and was evident in the fact that no one up the chain of command was prosecuted or punished.[157] Theories of accountability have one central proposition: blame falls to the bottom. When things go awry with policy, people shift the blame and those best placed to do so are at the top.

The narrative of a "few bad apples" is powerful. The images that formed a collective identity and the name of Abu Ghraib supported arguments of individual actions rather than structural culpability.[158] President Bush presented the images as depicting "disgraceful conduct by a few American troops, who dishonored our country and disregarded our values."[159] His statement reinforced that it was only the individuals on the ground responsible for the abuse rather than any high-ranking personnel. Donald Rumsfeld also pointed to control problems, deviant agents, and to the images from the prison.[160]

After the abuse went public, the key defense strategy focused on the images in order to isolate the acts they depicted.[161] Isolation was critical as the images had the most political effect. Separation from any inference that they might have resulted from policy, directly or indirectly, was essential. The effort to isolate the events as "violence/sexual abuse" that above all had no attachment to whatever was to be done to "set the conditions" for interrogation were conducted by precisely the same people who authorized these techniques. Despite evidence of techniques

highlighted in Major General Miller's recommendations such as sleep deprivation and loud noises; blame fell to the "few bad apples." The acts of torture that clearly involved military intelligence and the process of interrogation – those that risk implicating policymakers – were attributed to misinterpretation on the part of the intelligence personnel concerning what interrogation techniques were authorized for Abu Ghraib.

The eleven individuals, Specialist Charles Graner, Specialist Ivan Frederick, Sergeant Javal Davis, Sergeant Santos Cardona, Specialist Roman Krol, Specialist Armin Cruz, Specialist Jeremy Sivits, Specialist Sabrina Harman, Specialist Megan Ambuhl, Sergeant Michael Smith, and Private First Class Lynndie England, all received judicial punishment. Sergeant Michael Smith received the shortest sentence of 179 days in prison for his role as a dog handler. Specialist Charles Graner received the longest sentence. The military court sentenced Specialist Graner to ten years in prison at Fort Leavenworth but he was paroled after serving almost seven years.[162]

Members of the armed forces are tried under a different justice system meaning that accountability does not mirror the norms shared by the American population, government personnel, or the U.S. government itself. A court-martial is a military court that has the power to determine the guilt of members of the armed forces subject to military law. Members of the U.S. Armed Forces offenses are covered by the Uniform Code of Military Justice (UCMJ).[163] Stark differences between court-martials and civilian courts exist. Contrary to the principle of random jury selection in non-military courts, the convening authority can personally select the members of a court-martial jury.[164] In addition, the number of jurors varies from three to a dozen compared to the typical twelve jurors in civilian court.

One of the most important differences between a court-martial and civilian criminal court is that uniformed officers sit as the jury. The accused can request enlisted individuals in the member pool if they like as well. Officers hear the evidence like a federal criminal court but when it comes to deciding guilt, only two thirds majority is needed to convict. That is fundamentally different from where a unanimous verdict is needed in non-military courts.[165] There are no hung juries, voting is completed by secret ballot, and the jury does not determine the sentence.

A striking example of an Army court-martial that captivated the nation and the news was the case of Lynndie England, known for the graphic image of a nude prisoner on a dog leash and for giving a "thumbs up" next to a pyramid of naked Iraqis. Lynndie England is a former United States Army Reserve soldier who joined the Reserves in 1999 when she was a junior in high school. She was deployed to Iraq in June 2003 to perform guard duties at Abu Ghraib prison. Before her deployment, her only jobs had been as a cashier and at a chicken-processing factory. While stationed at Abu Ghraib, she tortured Iraqi detainees that resulted in her being court-martialed by the United States Army. She was the last soldier tried out of eleven due to becoming pregnant, while deployed, by Specialist Charles Graner who also tortured foreign detainees and was sentenced to ten years for his crimes.[166]

Specialist England claimed that the abuses had been ordered and that she did not recognize that they were doing anything they were not supposed to do. At her court-martial, the court did not allow testimony from an army officer about repeated patterns of abuse.[167] Rather, the court viewed that what happened elsewhere in Iraq did not reduce her liability. On April 30th, 2005, England agreed to a guilty plea bargain that would decrease her maximum sentence from sixteen to eleven years; however, her case was ruled a mistrial due to Graner's defense on

his charges of conspiracy that provided contradictory accounts. On September 26th, 2005, Lynndie England was convicted of six out of the seven charges. She was convicted of one count of conspiracy, four counts of maltreating detainees, and one count of committing an indecent act. England was acquitted on the second count of conspiracy. She was sentenced to three years in military prison at Naval Consolidated Brig, Miramar and dishonorably discharged which has significant negative implications. However, Lynndie England only served 521 days or a year and five months of her three-year sentence from September 27, 2005 to March 1st, 2007 and was released on parole.[168]

One of the pictures from Abu Ghraib showcased Specialist England "setting the conditions" for interrogation. She was looking down at a male detainee, naked at the end of tether. From her perspective, she was implementing policy. The prone stress position was approved. Nakedness was approved by Rumsfeld as a technique for shaming and humiliating detainees in December 2002.[169] The picture is conceivably a representation of the techniques in memos. Lynndie England could claim she was performing her duty: she had her detainee in a shameful and stressful position in order to "set the conditions."

Yet, only those at the bottom faced punishment. Individuals like Donald Rumsfeld were succinct. In 2005, when asked about Abu Ghraib, he said, "People have been punished and convicted in a court-martial. So, the idea that there's any policy of abuse or policy of torture is false. Flat false."[170] Rumsfeld still maintains that the blame for the abuse lies with a "small group of disturbed individuals."[171] He reasserted in his autobiography that the scandal was not linked to interrogation. He faults poor training and inadequate oversight.

The narrative of a "few bad apples" has persisted for over a decade in terms of Abu Ghraib. Historically, in counterinsurgency policy in Latin America, small groups of individuals

on the ground have also been blamed and widespread impunity remains[172] Many political leaders argued that prosecuting "dirty war" crimes would be dangerous to attempt. Despite Congressional inquiries and also published scholarship documenting CIA complicity in torture in Latin America, the agency and its torture paradigm have survived.[173] Most of the agents of these crimes walk free and remain in positions of power today. There is still clear resistance to full disclosure of torture and a lack of accountability in Latin America, especially from the CIA, which withheld files suspected of torture and human rights abuses.

Impunity for past crimes affects the present and the future, profoundly shaping the limits and possibilities of nations.[174] McSherry and Mejia (1999) stated that, "Impunity raises profound issues of justice and forgiveness, accountability and reconciliation, the limits of democracy and the tensions between the prerogatives of states and the rights of citizens."[175] In both, Latin America and Abu Ghraib, to set aside concepts fundamental to liberal democracy – equality before the law and judgement of crimes – is to create and perpetuate a flawed system. In short, the struggle to overcome a lack of structural accountability and build the rule of law is complex and ongoing.

13. Concluding Thoughts

Today, the word "torture" carries symbolic power, so much so that those governments and individuals accused of torture deny it vehemently on national and global stages – similar to Dr. Condoleezza Rice's denial in the fall of my senior year. For example, in the immediate aftermath of the scandal on May 4, 2004, Secretary of Defense Donald Rumsfeld spoke at a pressing briefing on Abu Ghraib prison. Rumsfeld was asked, "Mr. Secretary, a number of times from the podium you've said U.S. troops do not torture individuals…does this report undercut your notion that the U.S. doesn't torture?" Rumsfeld responded:

"My impression is that what has been charged thus far is abuse, which I believe technically is different from torture…I don't know if…it is correct to say what you just said, that torture has taken place, or that there's been a conviction for torture. And therefore, I'm not going to address the torture word."[176]

The euphemistic language used to discuss torture symbolizes that at the heart of torture is its denial. What is known as the scandal at Abu Ghraib has become an increasing complex story about how Americans can commit acts, with the apparent approval of the sovereign government, that clearly constitute torture. In this sense, Abu Ghraib is a microcosm of the structural issues not only of the U.S. government in terms of torture and accountability amid lasting counterinsurgency policy but also U.S. constructions of identity and national values. The United States sought to rewrite international conventions to justify torture by claiming to spread democracy and cultural change in the Middle East. Today's torture debate questions if our moral intuitions of principled limits on intelligence collection and interrogation procedures reflect a set of background conditions that no longer hold.

The events that transpired at Abu Ghraib fall into the troubled history of U.S.'s use of torture during counterinsurgencies and a lack of accountability for such violations of human rights at the national and international level. Justifications of torture play a crucial role in its routinization. Therefore, in order to focus on the prioritization of accountability going forward, we must continue to learn about these contested histories in order to understand how they are a matter of public concern. Why are cases of torture surprising when they are systemtic? From an informed historical perspective, what transpired at Abu Ghraib is not surprising. Hopefully, this research has provoked concerned individuals into a reflection on the link between state-sponsored abuse of prisoners at Abu Ghraib and a larger historical narrative of counterinsurgency, exceptionalism, and impunity.

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